

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**JASON O. NORMAN**  
Claimant

V.

**DEFFENBAUGH INDUSTRIES**  
Respondent

AND

**FARMINGTON CASUALTY INS. CO.**  
Insurance Carrier

Docket No. 1,065,361

## ORDER

Claimant requested review of the April 17, 2015, Award by Administrative Law Judge (ALJ) William G. Belden. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

## APPEARANCES

Mark E. Kolich of Lenexa, Kansas, appeared for the claimant. Mark J. Hoffmeister of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The Board has considered the post-award record and adopted the stipulations listed in the Award.

## ISSUES

The ALJ found the greater weight of the evidence proves the underlying work-related left knee injury is not the prevailing factor causing claimant's need for further medical care, and thus denied claimant's request for post-award medical treatment. Further, the ALJ determined the doctrine of equitable estoppel does not apply to bar respondent from disputing the request for future medical care.

Claimant argues there is a demonstrated physical injury that significantly aggravated the degenerative changes in his knee; therefore, he is entitled to compensation for all consequences of his work-related accident, including medical treatment. Further, claimant

contends the work-related nature of his degenerative disease was established by the settlement award, and res judicata prohibits re-litigation of this issue.

Respondent contends claimant failed to meet his burden of proving the work-related accident is the prevailing factor causing the need for additional medical treatment, and his request should therefore be denied. Respondent argues the parties did not stipulate claimant's preexisting arthritic condition was related to his work-related injury or that any permanent disability was associated with any aggravation of his preexisting condition. Respondent maintains the burden is on claimant to prove it is more probably true than not true that his underlying work-related injury is the prevailing factor in the need for further medical care pursuant to K.S.A. 44-510k.

The issues for the Board's review are:

1. Is claimant's work-related left knee injury the prevailing factor in causing his need for medical treatment?
2. Does res judicata prohibit re-litigation of the cause of the degenerative changes in claimant's left knee?

#### **FINDINGS OF FACT**

Claimant sustained a work-related injury to his left knee on March 22, 2013, while working for respondent. Respondent sent claimant to Dr. Lowry Jones for treatment. Following an MRI taken April 6, 2013, Dr. Jones diagnosed claimant with an acute, six-millimeter articular cartilage defect at the medial femoral condyle and chondromalacia. Dr. Jones performed surgery on claimant's left knee on April 26, 2013. In his operative report, Dr. Jones indicated postoperative diagnoses of "left knee advanced patellofemoral chondromalacia" and "grade 3/grade 4 lesion posterior medial femoral condyle."<sup>1</sup> Claimant continued postoperative care with Dr. Jones, including physical therapy and injections, until September 12, 2013, when he was determined to be at maximum medical improvement. Dr. Jones released claimant with permanent restrictions of no repetitive kneeling, squatting, or climbing.

Dr. Jones opined claimant sustained a 40 percent permanent partial impairment at the level of the left knee, though 20 percent of this rating was related to claimant's preexisting arthritic condition. Dr. Jones indicated claimant required future medical treatment, including possible injections or knee replacement. He noted claimant's work-

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<sup>1</sup> P.A.M. Trans., Cl. Ex. 1 at 25.

related injury was the prevailing factor in causing claimant's ongoing knee pain and need for continued medical treatment in the form of injections.<sup>2</sup>

On January 16, 2014, the parties entered into a settlement award based on a 20 percent impairment to claimant's left knee. The settlement excluded the 20 percent Dr. Jones found to be preexisting. At the settlement hearing, claimant testified he understood he must obtain prior authorization by respondent before undergoing future medical treatment.

Claimant returned to Dr. Jones on March 6, 2014, with ongoing left knee pain. Dr. Jones diagnosed claimant with traumatic arthritis and recommended he continue his permanent restrictions. Dr. Jones also recommended claimant see either Dr. Robert Gardiner or Dr. Daniel Gurba for discussion of a left total knee arthroplasty.

Respondent sent claimant to Dr. Matthew Thompson on April 11, 2014, for an evaluation. Claimant complained of pain with squatting and stairs, catching and grinding under the kneecap, and occasional stiffness/achiness in the knee with increased activity. Dr. Thompson reviewed claimant's history, medical records, and performed a physical examination. Dr. Thompson diagnosed claimant with chondromalacia of the left patella, noting the x-rays, MRI, and surgical findings were consistent with patellofemoral arthritis. Dr. Thompson wrote:

[Claimant's] work injury may have exacerbated [symptoms] or may be related to the small articular cartilage defect in the medial femoral condyle, but his current symptoms are caused by patellofemoral arthritis, which is a chronic problem not caused by his work injury.

We discussed treatment of patellofemoral arthritis, for which the best treatment is weight loss. We also discussed activity modification, exercise, occasional nsaid usage as options.<sup>3</sup>

The parties agreed to a neutral evaluation by a third physician, Dr. Scott Cook, due to the differing medical opinions. Dr. Cook examined claimant on November 4, 2014, when claimant's chief complaint was left knee pain. After reviewing claimant's medical records and history, taking additional x-rays, and performing a physical examination, Dr. Cook diagnosed claimant with severe bilateral patellofemoral osteoarthritis, symptomatic on the left, and bilateral medial and lateral knee compartment osteoarthritis. He recommended claimant continue with injections, weight loss, and activity modification. Dr. Cook opined:

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<sup>2</sup> *Id.* at 8.

<sup>3</sup> P.A.M. Trans., Resp. Ex. B at 3.

With regards to causation, it is my opinion within reasonable medical certainty that the injury which [claimant] sustained on 03/22/2011<sup>3</sup> [sic] is not the primary causative factor for the patient's symptomatic patellofemoral arthritis in the left knee. It is my opinion this is a chronic condition and this is evidenced by the fact that he does have it bilaterally with equal findings in both knees on x-ray. I do believe that his injury may have exacerbated his symptoms of patellofemoral arthritis in the left knee however, once again, the primary factor for his current condition and disability is the underlying patellofemoral arthritis which is present in both knees and has been present chronically as is evident by the MRI report from the MRI taken directly following his injury.<sup>4</sup>

Claimant stated he suffered no subsequent injuries or accidents to his left knee since the original injury of March 2013. At the post-award preliminary hearing, claimant stated it was his expectation Dr. Jones would continue to be his authorized physician, and he would not have settled his case had he known respondent would dispute future medical treatment or have him evaluated by other physicians. He later admitted he was informed at the settlement hearing of the approval process required for future medical treatment. Claimant currently works full-time as a sterile processor for Boone County Medical Center.

#### **PRINCIPLES OF LAW**

K.S.A. 2012 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-510k(a) states, in part:

(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the

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<sup>4</sup> P.A.M. Trans., Resp. Ex. A at 3.

administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

. . .

(4) No post-award benefits shall be ordered, modified or terminated without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551, and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

K.S.A. 2012 Supp. 44-508(g) states:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>5</sup> Accordingly, the findings and conclusions set forth reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

### **ANALYSIS**

#### **1. Is claimant’s work-related left knee injury the prevailing factor in causing his need for medical treatment?**

Claimant seeks medical treatment for what Dr. Jones identifies as traumatic arthritis. The ALJ denied claimant’s request because the work-related left knee injury was not the prevailing factor causing claimant’s need for a knee replacement. The Board agrees.

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<sup>5</sup> K.S.A. 2014 Supp. 44-555c(j).

Dr. Cook, based upon an examination of claimant made after the settlement award, opined the prevailing factor in claimant's need for medical treatment was underlying patellofemoral arthritis, and not claimant's March 22, 2013, work-related accident. Dr. Thompson, who also examined claimant after the January 16, 2014, settlement, while not specifically addressing the prevailing factor, opined claimant suffered from a chronic problem not related to his work injury.

Dr. Jones did not record a diagnosis of left knee traumatic arthritis until March 6, 2014, after this case was settled. Only then did he recommend a referral to another specialist for discussion of a left knee replacement.<sup>6</sup> Dr. Jones' diagnosis of traumatic arthritis differed from his previous diagnosis of chondromalacia. Dr. Jones' note does not comment on why he changed his diagnosis, nor if the traumatic arthritis is new, preexisting or related to claimant's original injury. The Board finds the medical opinions of Drs. Cook and Thompson more persuasive. The prevailing factor causing claimant's need for a knee replacement is underlying patellofemoral arthritis, not the March 22, 2013, work-related injury.

**2. Does res judicata prohibit re-litigation of the cause of the degenerative changes in claimant's left knee?**

Claimant argues res judicata prevents re-litigation of whether he is entitled to additional medical treatment for his left knee condition. "[R]es judicata . . . applies when issues were previously raised and decided on the merits, or could have been presented but were not. [Citations omitted]. Res judicata consists of four elements: (1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits."<sup>7</sup> In this case, there was no final judgement on the issue of future medical care.

Claimant cites *Bazil v. Detroit Diesel Central*,<sup>8</sup> in support of his argument that res judicata applies. *Bazil* involved an appeal on an award of post-award medical treatment where the respondent wanted to re-litigate whether a medical condition was work-related. In *Bazil*, the Court of Appeals held res judicata applied, finding the parties agreed to a settlement in which the medical evidence demonstrated the claimant's inflammatory arthritis was work-related. In this case, no such medical evidence was placed into the record that the settlement contemplated respondent's responsibility for claimant's

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<sup>6</sup> P.A.M. Trans., Cl. Ex. 1 at 1.

<sup>7</sup> *State v. Martin*, 294 Kan. 638, 640-41, 279 P.3d 704 (2012) *cert. denied*, 12-10442, 2013 WL 2289952 (U.S. Oct. 7, 2013), citing *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 413, 49 P.3d 1274, *cert. denied* 537 U.S. 1088, 123 S.Ct. 700, 154 L.Ed.2d 632 (2002).

<sup>8</sup> *Bazil v. Detroit Diesel Cent. Remanufacturing*, No. 99,613, 197 P.3d. 905, 2008 WL 5401467 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008).

patellofemoral arthritis. Based upon the evidence presented in this case, the doctrine of res judicata does not apply.

**CONCLUSION**

Claimant's work-related accident of January 1, 2013, is not the prevailing factor for claimant's current need for medical treatment. The doctrine of res judicata does not apply to the facts in this case.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge William G. Belden dated April 17, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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William G. Belden, Administrative Law Judge